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BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934	)	WT Docket No. 97-197

97-197

COMMENTS OF
PRIMECO PERSONAL COMMUNICATIONS, L.P.

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Table of Contents

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COMMENTS OF PRIMECO PERSONAL COMMUNICATIONS, L.P.

PrimeCo Personal Communications, L.P. ("PrimeCo")[1] hereby files comments in the above-referenced proceeding.[2] As discussed herein, PrimeCo opposes any interpretation of Section 332(c)(7)(B)(iv) that confers enforcement or regulatory authority on state and local jurisdictions with respect to the Commission's radiofrequency ("RF") radiation requirements. In addition, although PrimeCo generally supports

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1 PrimeCo is a limited partnership comprised of PCSCO Partnership (owned by NYNEX PCS, Inc. and Bell Atlantic Personal Communications, Inc.) and PCS Nucleus, L.P. (owned by AirTouch PCS Holding, Inc. and U S WEST PCS Holdings, Inc.). PrimeCo is the broadband A/B Block PCS licensee or is the general partner/majority owner in the licensee in the following MTAs: Chicago, Milwaukee, Richmond-Norfolk, Dallas-Fort Worth, San Antonio, Houston, New Orleans-Baton Rouge, Jacksonville, Tampa-St. Petersburg-Orlando, Miami and Honolulu.

2 *In re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, WT Docket No. 97-197, *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, ET Docket No. 93-62, *Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of CMRS Transmitting Facilities*, RM-8577, *Second Memorandum Opinion and Order ("Second MO&O") and Notice of Proposed Rulemaking ("Notice")*, FCC 97-303 (rel. August 25, 1997).

the Commission's proposed procedures for preempting inconsistent state and local regulations of private wireless facilities on the basis of RF radiation concerns, it urges the adoption of certain modifications to more effectively implement Congress' objective in enacting Section 332(c)(7).

SUMMARY

PrimeCo urges the Commission to affirm its exclusive jurisdiction to regulate and enforce RF radiation exposure guidelines for personal wireless communications facilities. Congress has charged the Commission with preemptive federal authority to establish and enforce uniform RF standards based on the best available science. Anything beyond a limited right of inquiry given state/local governments to confirm compliance, would thwart Congress' objective of rapidly deploying innovative and competitive telecommunications services, and would be otherwise contrary to law.

PrimeCo urges the Commission to appropriately interpret its preemption powers to preclude inconsistent state and local RF actions. This authority encompasses all inconsistent state and local acts (not just final actions) which are based directly, indirectly or only partially on RF radiation concerns or RF interference matters. Similarly, state and local entities should not be allowed to demand compliance documentation more extensive and burdensome than the Commission requires.

Finally, PrimeCo supports the Commission's efforts to provide expeditious relief to wireless carriers adversely affected by inconsistent state and local RF regulation and proposes certain modifications to those procedures. The Commission should adopt its proposed rebuttable presumption that a wireless carrier complies with the

Commission's RF rules. The Commission should modify this proposal, however, to include a default judgment provision for localities that fail to establish a material issue of non-compliance. The Commission should also apply its standing requirements with appropriate flexibility.

INTRODUCTION

PrimeCo is actively deploying facilities in its various MTA markets and has expended considerable resources complying with facilities siting ordinances and procedures in a large number of local jurisdictions. PrimeCo fully acknowledges the important role that states and localities play in the facilities siting process. In order for wireless service providers to deploy their network efficiently and expeditiously, however, uniform technical and operational requirements are essential. Congress and the Commission recognized this need and adopted technical and operational requirements — including uniform federal RF emission guidelines — so that PCS and other wireless service providers will not be subject to a myriad of conflicting rules and regulations.

Notwithstanding the Commission's clear preemptive authority, PrimeCo and other CMRS providers have confronted locally-imposed RF emission regulations and other legal requirements inspired by concern for RF emissions that undermine Congress' objectives. There is also misunderstanding of, and outright disregard for, the Commission's RF emissions regulations. Expeditious Commission review and preemption of inconsistent state and local RF regulations and actions is essential to CMRS deployment and service provision, and PrimeCo therefore urges the Commission to promptly act in this matter.

DISCUSSION

I. THE COMMISSION HAS EXCLUSIVE JURISDICTION TO ENFORCE ITS RF RADIATION RULES AND SHOULD NOT PERMIT STATE AND LOCAL GOVERNMENTS TO IMPOSE SEPARATE RF COMPLIANCE REQUIREMENTS

Since the initial passage of the Communications Act ("Act"), Congress has vested exclusive authority in the Commission to regulate RF matters pertaining to communications facilities.[3] While state and local governments have historically retained zoning and land use authority with respect to these facilities, this authority has never been interpreted to include RF matters within the exclusive jurisdiction of the Commission. Moreover, there is no indication in the Telecommunications Act of 1996, or within its associated legislative history, that Congress intended to confer any of this long-standing authority to state and local governments. In fact, the 1996 Act confirmed the Commission's authority over RF matters and expressly preempted state and local government involvement in this area.

A. Local and State Government Advisory Committee Recommendation No. 5 is Inconsistent with the Commission's Exclusive Authority Over RF Matters Conferred Under the Communications Act

Section 332(c)(7)(B)(iv) of the Communications Act, as enacted in 1996, provides that:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions *to the extent that such facilities*

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[3] *See* 47 U.S.C. §§ 301, 302, 303.

> *comply with the Commission's regulations concerning such emissions.*[4]

In its June 27, 1997 recommendation to the Commission, the Local and State Government Advisory Committee ("LSGAC") seizes upon the last clause of Section 332(c)(7)(B)(iv), as emphasized above, to argue that the Act "thus *preserves* the right of state and local authorities to ensure that personal wireless services comply with the Commission's RF emission's regulations."[5] LSGAC goes on to argue that state and local officials, at no cost to local taxpayers, should be given the authority to request documentation, investigate complaints and inspect facilities to determine compliance with the Commission's RF rules.[6]

Consistent with the Communications Act, the legislative history of Section 332(c)(7)(B)(iv), and well-settled case law, it is beyond contention that the Commission possesses *exclusive* jurisdiction to regulate RF emissions from personal wireless facilities. Accordingly, PrimeCo disagrees with any suggestion in the LSGAC recommendation that Section 332(c)(7)(B)(iv) confers any enforcement authority on state and local entities with respect to these matters. To the contrary, the legislative history expressly provides that:

> [t]he limitations on the role and powers of the Commission . . . relat[ing] to local land use regulations are not intended to limit or affect the Commission's general authority over radio telecommunications, including the

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4 47 U.S.C. 332(c)(7)(B)(iv) (emphasis added).

5 Local and State Government Advisory Committee, Advisory Recommendation No. 5, ¶ 2 (filed June 27, 1997) (emphasis in original).

6 *Id.* at ¶¶ 4-5. The Commission has entered the LSGAC recommendation into the record as comments in this proceeding. *Notice* ¶ 115.

> authority to regulate the construction, modification and operation of radio facilities.[7]

This general authority includes, moreover, exclusive jurisdiction over the "external effects and the purity and sharpness of the emissions from each station and from the apparatus therein."[8] In addition, the United States Supreme Court has held that the Commission has exclusive jurisdiction over radio technical matters.[9] Thus, any interpretation of Section 332(c)(7)(B)(iv) that purports to limit or otherwise effect the Commission's exclusive RF authority would be contrary to law.

Section 332(c)(7)(B)(iv), as the Commission has acknowledged, does suggest that state and local entities have a right to *inquire* whether a particular facility will, or does comply with the Commission's RF radiation rules.[10] As discussed below, such inquiries are adequately addressed by the procedures described by the Commission in its first alternative showing proposal.[11] Specifically, if such inquiries reveal that a

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7 H.R. Conf. Rep. 104-458, at 209 (emphasis added) ("Conference Report").

8 47 U.S.C. § 303(e).

9 *Head v. New Mexico Bd. of Exam. in Optometry*, 374 U.S. 424, 430 n.6 (1963); *see also In re Appeal of Graeme and Mary Beth Freeman, et al.*, 1997 U.S. Dist. LEXIS 12141 (D. Vt. 1997); *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 997 (6th Cir. 1994); *Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Transmission Facilities*, FCC 97-296, Notice of Proposed Rulemaking (rel. Aug. 19, 1997) (citing 47 U.S.C. §§ 152(a), 301, 303(c), (d), (e) and (f)); *Mobilecomm of New York, Inc.*, 2 FCC Rcd 5519 (Com. Car. Bur. 1987); *960 Radio, Inc.* FCC 85-578 (rel. Nov. 4, 1985).

10 *See Notice* ¶ 142 ("it is reasonable for state and local governments to *inquire* as to whether a specific personal wireless service facility will comply with our RF emission guidelines.") (emphasis added).

11 *See infra* at Section I.B.

facility will comply with the Commission's RF rules, then there is nothing further for the locality to do on the RF emission issue. If, on the other hand, non-compliance is revealed, then the Commission's existing application and enforcement procedures provide an adequate and exclusive remedy.[12] In sum, nothing in the Act or the legislative history remotely suggests that state and local governments are granted any authority to interpret, apply, or enforce the Commission's RF rules, much less require separate testing, investigation or inspection of facilities.

B. Wireless Carriers Should Not be Required to Provide State and Local Governments with RF Radiation Compliance Documentation More Extensive than the Commission Requires

The Commission seeks comment on two alternative proposals governing the scope of compliance documentation that state and local entities may require from wireless carriers seeking local building and zoning approvals for new or modified facilities. Both proposals contain identical showing requirements for non-categorically excluded facilities: namely, applicants and licensees seeking local zoning or other land use approvals would be required, upon the request of appropriate state and/or local land use authorities, to provide copies of "any and all documents related to RF emissions submitted to the Commission as part of the licensing process."[13] PrimeCo does not object to this proposal inasmuch as it is consistent with the Commission's exclusive jurisdiction and the limited right of localities under Section 332(c)(7)(B)(iv) to *inquire* as to whether a specific facility will comply with the Commission's RF rules.

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12 *See, e.g.*, 47 U.S.C. §§ 301, 312; 47 C.F.R. §§ 1.17, 1.80, and 1.1307, *et seq.*

13 *Notice* ¶ 143.

With respect to categorically excluded facilities, however, the Commission's two showing proposals differ significantly. Specifically, under the Commission's first alternative showing proposal, applicants/licensees of categorically excluded facilities would be required, upon the request of state or local land use authorities, to *certify* compliance with the Commission's RF rules; under the Commission's second alternative showing proposal, applicants/licensees of categorically excluded facilities would be required to *demonstrate* compliance with the Commission's RF rules.

PrimeCo supports the first showing proposal for categorically excluded facilities to the extent that carriers are *only* required to self-certify that a particular facility complies with the Commission's rules for categorically excluded facilities, and that the Commission has determined that such facilities do not individually or cumulatively have a significant effect on the human environment.[14] Such a certification is consistent with Section 1.1307(b)(1) of the rules, which provides that licensees whose facilities are categorically excluded from further environmental processing need do nothing further to determine compliance with the Commission's RF radiation exposure limits.[15] By contrast, PrimeCo opposes the second alternative showing proposal, as the Commission itself has found that compliance demonstrations with respect to categorically excluded facilities are unnecessary and burdensome.

It is worth emphasizing that the underlying objective of the categorical exclusion rule is the elimination of an unnecessary regulatory burden on applicants and licensees. Furthermore, by definition, the Commission has *already* determined that the

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14 *See* 47 C.F.R. § 1.1306(a).

15 47 C.F.R. § 1.1307(b)(1).

facilities subject to the categorical exclusion individually and cumulatively have no potential for significantly affecting the environment.[16] Thus, when it adopted its new RF rules last year, the Commission noted that it continues "to believe that it is desirable and appropriate to categorically exclude from routine evaluation those transmitting facilities that offer little or no potential for exposure in excess of the specified guidelines."[17] In addition, the Commission observed that requiring "routine environmental evaluation of [categorically excluded] facilities would place an unnecessary burden on licensees."[18] Finally, as the Commission recently noted in its *Second Memorandum Opinion and Order,* if a facility or device

> has been categorically excluded from environmental processing requirements with respect to the RF exposure guidelines based on the Commission's prior determination that the operation of such facility or device, individually or cumulatively, will not exceed the Commission's adopted RF exposure limits, the applicant is *exempt* from performing any calculations and/or measurements to determine whether there is compliance; *the Commission presumes that operation of a categorically excluded facility or equipment is in compliance.*[19]

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16 Pursuant to the National Environmental Policy Act of 1969 ("NEPA"), Pub L. No. 91-190, 83 Stat. 852, *codified at* 42 U.S.C. §§ 4321-75, Congress directed federal agencies to require environmental processing only with respect to major actions significantly affecting the environment. *See* 42 U.S.C. § 4332(2)(C). The Council on Environmental Quality ("CEQ"), established by Congress to implement NEPA, further refined the concept of major federal actions to categorically exclude actions which do "not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect." 40 C.F.R. § 1508.4. This concept has been incorporated in the Commission's rules. *See* 47 C.F.R. §§ 1.1306(a) and 1.1307(b)(1).

17 *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Report and Order, 11 FCC Rcd 15123, 15156 (1996).

18 *Id.*

19 *Second MO&O* at ¶ 16 (emphasis added).

In sum, requiring categorically excluded facilities to demonstrate compliance with the Commission's RF rules is unnecessary, burdensome, and contrary to law and Commission requirements. Further, compliance with such unnecessary requirements would delay implementation of service, improperly shift state and local land use decisions to RF radiation concerns, and would require compiling and supplying technical information to local entities ill-suited to interpret technical data which the Commission itself, the expert agency, does not require.

II. THE COMMISSION SHOULD INTERPRET SECTION 332(c)(7) CONSISTENT WITH THE BROAD SCOPE OF ITS RF EMISSION PREEMPTION AUTHORITY

A. The Commission's Use of "Final Action" to Trigger its Preemptive Authority is Inconsistent with Section 332(c)(7)

The Commission has assumed, for purposes of this definition, that its jurisdiction relating to state and local RF emission regulation is limited to the review of a state or locality's "final action."[20] As discussed below, this aspect of the *Notice* is inconsistent with Section 332(c)(7), which prohibits localities from *regulating* "the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions . . . ."[21]

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20 *See Notice* ¶ 137 ("We propose to adopt this definition of 'final action' *for the purpose of determining whether a state or local regulation is ripe for review* under Section 332(c)(7)(B)(v) . . . .") (emphasis added). Specifically, the Commission has proposed to define the term "final action" to mean "the final administrative action at the state or local government level regarding construction of a proposed site." *Notice* ¶ 137.

21 47 U.S.C. § 332(c)(7)(B)(iv).

The plain language of the statute gives the Commission preemptive authority over a broader class of state and local RF regulation, providing that:

> [a]ny person adversely affected *by an act or failure to act* by a State or local government or any instrumentality thereof *that is inconsistent with clause (iv)* may petition the Commission for relief.[22]

Thus, the Commission's jurisdiction to consider RF matters applies to simple local government "act[s]," *as well as* "final action."[23] Further, Section 332(c)(7)(B)(iv) preempts inconsistent state and local RF emission "regulation" generally.[24] Further, a review of Section 332(c)(7)(B)(v) and its context further demonstrates that Congress intended that the Commission have authority to broadly preempt state and local RF emission regulation.[25]

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22 47 U.S.C. § 332(c)(7)(B)(v) (emphasis added). By contrast, "final actions" relating to RF emissions may also be reviewed in the courts, at the discretion of the aggrieved party. *Id.*

23 *See Russello v. United States*, 464 U.S. 16, 23 (1983) (where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely); *Taracorp, Inc. v. NL Industries, Inc.*, 73 F.3d 738, 744 (7th Cir. 1996) (the choice of substantially different words to address analogous issues signifies a different approach); *Florida Public Telecommunications Ass'n v. FCC*, 54 F.3d 857, 860 (D.C. Cir. 1995) (when Congress uses different language in different sections of a statute, it does so intentionally).

24 *Id.* § 332(c)(7)(B)(iv)

25 *See Bailey v. United States*, 116 S.Ct. 501, 506 (1995) (in determining the meaning of a word in a statute, courts consider the placement and purpose in the statutory scheme); *Smith v. United States*, 113 S.Ct. 2050, 2056 (1993) (single word or single provision of statute cannot be read in isolation).

The Commission has acknowledged its broad RF preemption authority in the *Notice* and in other contexts.[26] Under the Commission's proposal, however, a CMRS provider could be precluded from seeking preemption until a locality formally rejects a siting application — even if the underlying ordinance governing the locality's consideration of the application flagrantly contravenes Section 332(c)(7)(B)(iv). A CMRS provider should not be required to expend time and resources applying for (and being denied) a siting permit under these circumstances, and should be able to challenge a generally applicable ordinance as well.

B. The Commission Should Clarify that the Relevant Issue for Case-By-Case Consideration Is Whether a Failure to Act is Premised on Concern for the Environmental Effects of RF Emissions

The Commission has proposed to "determine whether a state or local government has failed to act on a case-by-case basis, considering various factors such as how state and local governments typically process other facility siting requests and other RF-related actions by these governments."[27] PrimeCo agrees that the issue of whether a "failure to act" triggers the Commission's jurisdiction is appropriately determined on a case-by-case basis. As set forth in the *Notice*, however, the Commission has proposed to unnecessarily complicate how it will determine whether a locality's inaction is preempted.

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[26] *See Notice* ¶ 119 (stating that the preemption procedures will apply to "request[s] for relief . . . concerning a specific state or local *regulation, action or failure to act*" (emphasis added)); Letter from Michele Farquhar, Chief, Wireless Telecom. Bur. to Thomas E. Wheeler, Pres. Cellular Telecommunications Indus. Ass'n, dated January 13, 1997, at 2.

[27] *Notice* ¶ 138. *See also* discussion of indirect RF emission regulation *infra* at Section III.

As the Commission has noted, Congress intended that local action or inaction based either "directly or indirectly on the environmental effects of RF emissions" be prohibited.[28] Where a locality's inaction is involved, then, the sole issue for consideration is the extent to which the locality's failure to act is premised directly or indirectly on concern for RF emission regulations. If, for example, a local zoning board defers action on a siting application or extends a moratorium due to citizens' voiced concerns for RF emissions or to "study the RF emissions issue further," PrimeCo submits that so long as the proposed facilities would be in compliance with the Commission's RF emission rules, the locality's inaction implicates Section 332(c)(7)(B)(iv) preemption. In such circumstances, factors such as the "average length of time it takes to issue various types of siting permits" are immaterial to such a determination.

III. THE COMMISSION SHOULD PREEMPT LOCAL REGULATION PARTIALLY BASED ON RF EMISSION REGULATION OR FOR WHICH NO FORMAL JUSTIFICATION IS PROVIDED

The Commission also seeks comment on whether it should grant relief from local regulation "based only partially" on the environmental effects of RF emissions, or which is based on RF emission concerns but for which no formal justification is provided.[29] As stated above, Congress clarified in the legislative history to Section 332(c)(7)(B)(iv) its intent to preempt local regulation based "directly or indirectly" on concern for the environmental effects of RF emissions.[30] Furthermore, if the Commission

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28 *Id.* ¶ 139 (citing H.R. Conf. Rep. 104-208 (1996) at 208)).

29 *Notice* ¶¶ 139-140.

30 Conference Report at 208.

does not act as Congress intended, a state or locality could easily circumvent the Commission's preemptive authority by providing a "laundry list" of reasons purportedly justifying its action or inaction. Accordingly, PrimeCo supports the Commission's conclusion that preemption in such cases is appropriate.[31]

The Commission proposes that it would preempt "only that portion of an action or failure to act that is based on RF emissions, and to permit the adversely-affected party to seek [judicial] relief from the remainder of the [state or local regulation]."[32] PrimeCo submits that in some instances, however, a state statute or local ordinance is not easily severable into "RF" and "non-RF" provisions. The Commission should clarify that in such instances it will act to preempt all relevant provisions. This is consistent with the Commission's mandate to preempt regulation *partially based* on RF emissions and, indeed, is necessary to fully effectuate the Commission's preemptive authority.

Finally, the Commission should expressly preempt local RF interference ("RFI") regulation under the same procedures as those adopted herein. PrimeCo's experience has indicated that localities are adopting a variety of technical regulations relating to RF emissions, including regulations requiring RF interference and intermodulation interference studies. Such regulation clearly contravenes the Commission's exclusive authority to regulate RF interference ("RFI") and technical matters generally.[33] Furthermore, RFI and RF emission regulation are part and parcel to the

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31 *Notice* ¶ 139.

32 *Id.*

33 *See* 47 U.S.C. §§ 152(a), 301, 303(c)-(f); *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 430 n.6 (1963); *In re Appeal of Graeme and Mary*

(continued...)

same subject matter. Indeed, Chairman Hundt acknowledged this in a letter to San Diego Mayor Susan Golding, stating:

> [The Commission] consider[s] *modulation part of the "emission" over which [it] has authority under the Communications Act.* Therefore, [the Commission] would not agree with a statement that "Section 704(a) does not preempt states and cities from regulating antenna placement on the grounds of radio frequency modulation."[34]

Thus, CMRS licensees should be able to avail themselves of the same procedures and remedies available under Section 332(c)(7)(B)(v) and adopted in the instant proceeding when confronted with local RFI *and* RF radiation regulation.

IV. THE COMMISSION SHOULD ENSURE THAT THE PROCEDURES ADOPTED IN THIS PROCEEDING PROMOTE EXPEDITIOUS REVIEW OF REQUESTS FOR RELIEF

A. The Commission Should Establish a Date Certain for the Consideration of Preemption Requests and Establish Default Procedures

The Commission proposes to require parties seeking preemption to file a petition for declaratory ruling under Section 1.2 of the Commission's rules, and to apply the existing rules concerning the filing of responsive pleadings.[35] Under these procedures, a copy of the petition would be served on the relevant state or local authority, oppositions to the petition may be filed within 10 days after the original pleading is filed, and replies may be filed five days later, resulting in a comment period of approximately

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33 (...continued)
Beth Freeman, et al., 1997 U.S. Dist. LEXIS 12141 (D.Vt. 1997).

34 Letter from Reed Hundt, Chairman, Federal Communications Commission to the Honorable Susan Golding, Mayor, City of San Diego, dated March 15, 1996, at 5 (emphasis added).

35 *Notice* ¶¶ 149-150.

three weeks between the date of filing and the date that replies are filed.[36] PrimeCo generally supports the Commission's objective of promoting the expeditious consideration of 332(c)(7) preemption requests, but would recommend certain changes to the Commission's proposed procedures.[37]

No matter the particular timing or sequence of filings the Commission adopts, CMRS providers need the assurance that the Commission will process RF matters expeditiously. Thus, PrimeCo supports PCIA's recommendation that the Commission be required to rule on the petition within 30 days after completion of the comment cycle. Indeed, the Commission is already considering the adoption of such a self-imposed deadline for broadcast facilities;[38] such a policy is even more appropriate for personal wireless communications facilities, where Congress has *expressly* preempted state and local regulation and where prompt service deployment is a mandated Congressional objective.[39]

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36 47 C.F.R. § 1.45.

37 PrimeCo also would not object to the alternative approach suggested by PCIA, wherein parties would have 30 days to respond to the petition. PCIA has proposed the following: (1) the aggrieved party would serve the state and locality with the request; (2) the state or locality and interested members of the public would then have 30 days to respond; and (3) the Commission would be required to rule on the petition within 30 days thereafter. *See* Letter to Michele Farquhar, Chief, and Rosalind Allen, Deputy Chief, Wireless Telecom. Bur., from Jay Kitchen, Pres., Personal Communications Industry Ass'n, dated March 19, 1997.

38 *See Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities*, MM Docket No. 97-182, Notice of Proposed Rulemaking, FCC 97-296, ¶ 18, App. B (rel. Aug. 19, 1997).

39 *See Notice* ¶¶ 120-123 (discussing Section 332(c)(7)(B)(iv) preemption authority); 47 U.S.C. § 309(j)(3)(A) (mandating that Commission promote rapid

(continued...)

PrimeCo further submits that, regardless of whether the Commission adopts a self-imposed deadline for ruling on petitions, *default judgment procedures* should be adopted. In considering preemption petitions, the Commission will be acting in an adjudicative capacity in which the parties and issues involved will be clearly defined. The Commission has already established default procedures for adjudicative proceedings, and such procedures are no less appropriate here.[40] Specifically, if a state or locality fails to respond to a petition, and the petition otherwise establishes a *prima facie* case for preemption, preemption should be triggered immediately after the date for filing oppositions. Similarly, where a locality fails to present a *prima facie* case on rebuttal and provides merely a conclusory objection to a carrier's petition, the record in the proceeding would support expeditious preemption. The only case in which further consideration of a petition is warranted would be where a locality raises a material issue of fact rebutting the presumption of carrier compliance and further proceedings are required.[41]

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39 (...continued)
deployment of services and technologies).

40 *See* 47 C.F.R. §§ 1.724(b) (common carrier failing to answer complaint may be subject to default judgment), 76.956(e) (cable operator may be subject to default judgment for failure to respond to rate complaint).

41 *See Notice* ¶ 153.

B. Standing Limitations Are Appropriate but Should Be Applied Flexibly

The Commission has proposed limiting participation in RF preemption proceedings to interested parties able to demonstrate standing. PrimeCo agrees that if the Commission is to address preemption requests expeditiously, and because adjudicative proceedings are involved, standing limitations are appropriate.[42] Furthermore, Section 332(c)(7)(B)(v) limits petitions to persons "adversely affected" by state or local action or inaction; thus, it is clear that Congress intended that these not be open proceedings.[43]

PrimeCo cautions, however, that the Commission should exercise appropriate flexibility in applying standing limitations in Section 332(c)(7)(B)(v) preemption proceedings. In this regard, "interested parties" eligible to comment on a carrier's petition should not be limited to, for example, the single carrier and the local government who participated in the underlying dispute before a local zoning board. While CMRS carriers apply to local agencies for construction permits largely independent of one another, a local government action on a single application, if upheld by the Commission, will have a precedential impact on other carriers authorized to provide service in that locality. Thus, it is important that the Commission apply its standing limitations flexibly where an underlying state statute or municipal ordinance is

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42 *See* 47 C.F.R. § 1.2 (declaratory rulings issued "in accordance with section 5(d) of the [APA]"). Section 5(d) is codified in the "Adjudications" section of the APA. *See* 5 U.S.C. § 554(e); *Radiofone, Inc., et al.*, 759 F.2d 936, 939 (D.C. Cir. 1985). *See also Omnipoint Communications, Inc., New York MTA, Frequency Block A*, 11 FCC Rcd. 10785, 10788 (1996) (standing limitations may be appropriate in declaratory ruling context).

43 *See* 47 U.S.C. § 332(c)(7)(B)(v).

at issue. Other carriers may be affected by a generally applicable ordinance or statute, and the Commission's standing determinations should reflect this.

V. THE COMMISSION SHOULD ADOPT ITS PROPOSED REBUTTABLE PRESUMPTION OF CARRIER COMPLIANCE

The Commission has proposed that personal wireless facilities be deemed presumptively in compliance with the Commission's RF guidelines, and states or local governments would have the burden of overcoming this presumption by demonstrating that the facility in question does not or will not comply with the Commission's rules.[44] PrimeCo supports this proposal and agrees with the Commission's stated reasons for its adoption. Such a presumption is also consistent with Congress' intention that the Commission be the primary governmental entity charged with regulating the environmental effects of RF radiation emitted from communications facilities. Indeed, requiring CMRS providers to affirmatively demonstrate compliance beyond what is already required in the Commission's rules would undermine the objective of those rules, which are designed, in part, to exclude from routine evaluation "those transmitting facilities [the Commission has] reason to believe offer little or no potential for exposure in excess of [the limits set forth in the rules]."[45]

The Commission has also enumerated means by which an interested party might rebut the presumption, including submission of an Environmental Assessment ("EA") with detailed RF measurements or calculations that demonstrates that the Commis-

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44 *Notice* ¶ 151.

45 *Notice* ¶ 45.

sion's guidelines would be exceeded.[46] PrimeCo does not object to this proposal, but notes that in gathering and submitting evidence to rebut the presumption, localities should be required to affirmatively demonstrate, at their own expense, a carriers' non-compliance by means of the testing and measurement procedures provided in the Commission's rules.[47] Furthermore, the *only* instance in which a carrier should be required to reimburse a locality for such costs is where the locality in fact demonstrates that the Commission's rules/guidelines are or would be exceeded.

Finally, the examples of rebuttal evidence cited by the Commission apply to a showing that "*a particular facility* does not in fact comply with [the Commission's] RF limits."[48] As discussed *supra*, however, the Commission's RF emission preemption authority extends to state and local regulation generally and is not limited to siting applications for individual facilities.[49] Thus, where an underlying ordinance or statute is at issue, the Commission should adopt the related rebuttable presumption that state and local regulation over the environmental effects of RF emissions is inconsistent with the statute, and states and localities must demonstrate how their ordinances do not conflict with the Commission's preemptive authority.[50]

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46 *Notice* ¶ 153.

47 47 C.F.R. § 1.1310.

48 *Notice* ¶ 153 (emphasis added).

49 *See supra* Section I.A.

50 *See* 47 C.F.R. § 24.104(b); *Preemption of Local Zoning Regulations of Satellite Earth Stations,* Report and Order and Notice of Proposed Rulemaking, 11 FCC Rcd. 5809, 5816 (1996).

CONCLUSION

There is considerable misunderstanding among local governments as to the preemptive force of the 1996 Act and the Commission's RF emission rules. As PrimeCo has demonstrated herein, and as evidenced by the Commission's preemption authority under Section 332(c)(7), the Commission's jurisdiction over RF matters is exclusive. The Commission should expeditiously adopt the preemption procedures proposed in the *Notice*, with the modifications discussed herein, so that wireless service providers can proceed with facilities and service deployment as Congress intended.

Respectfully submitted,

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